No. 5906

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

FIDELITY AND DEPOSIT COMPANY OF MARYLAND (a corporation),
Appellant,

vs.

A. G. COL COMPANY, INC. (a corporation),
Appellee.

BRIEF FOR APPELLANT.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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STATEMENT OF FACTS.

In the month of June, 1925, an action was begun in the Superior Court of Santa Clara County, entitled, "California Sweet Potato Corporation, a corporation, Plaintiff, vs. L. E. Bontz * * *, A. G. Col Company, Inc., a corporation, et al., Defendants," and in that action, upon the ex parte application of plaintiff's attorneys, and without notice to the A. G. Col Company, A. G. Col was appointed Receiver of that corporation. The defendant in the present action was the surety on Col's bond as Receiver.

Col retained his office as Receiver only about two days. (Transcript p. 99.) He was superseded by another Receiver (J. P. Napoli) who remained in office for a few months, until the orders appointing

both receivers were vacated by the Supreme Court of the State of California, in a proceeding in Prohibition.

See:

A. G. Col Company v. Superior Court, 196 Cal. 604. (Transcript p. 83.)

The Supreme Court held that the orders appointing both receivers were void, as the court had exceeded its jurisdiction; and consequently the order by which Col had been appointed Receiver was vacated and annulled.

When Col was superseded as Receiver, he filed an account which was accepted and approved by the Superior Court, and an order was made approving his account and discharging him as Receiver, and discharging the surety on his bond. (Transcript pp. 102-108.)

After the Supreme Court had annulled the orders appointing the Receivers suits were brought upon Col's bond and also upon the bond of Napoli, the second Receiver. Judgment went in favor of the surety on Napoli's bond in another action, which is not pertinent to this case.

This suit involves merely the liability of the surety upon Col's bond. The amount of the bond was *$5,000.00.* The complaint in this action specified damages as follows: loss of profits in the corporation's business; loss of credit and good will; the payment of attorney fees and other expenses to secure the annulment of the order appointing Col Receiver. (Transcript p. 9.)

The jury returned a verdict in favor of the plaintiff for the sum of *$6,300.00* (Transcript p. 36), which was cut down to the sum of $5,200.00 by the court. (Transcript p. 43.) The plaintiff consented to the reduction of the judgment to that amount. (Transcript p. 42.) This appeal is, accordingly, from a judgment of $5,200.00. The appellant submits that it is entitled to a reversal upon the following grounds:

ARGUMENT.

I.

THE ORDER OF THE SUPERIOR COURT PURPORTING TO APPOINT COL RECEIVER OF THE CORPORATION WAS VOID AS THE COURT EXCEEDED ITS POWERS.

Col was appointed receiver upon an ex parte order of the Superior Court of Santa Clara County. (Transcript pp. 6, 83, 46-7.) The procedure is governed by Section 566 of the Code of Civil Procedure of the State of California. It provides (1) no party * * * interested in an action * * * can be appointed Receiver therein without the written consent of the parties * * *. (2) If a Receiver is appointed upon an ex parte application the court, *before making the order*, must require from the *applicant* an undertaking for the payment of damages.

A. No Applicant's Bond Was Filed, As Section 566, C. C. P., Requires.

In this case the court made an ex parte order appointing Col Receiver, and he gave the Receiver's bond which is sued upon in this action. (Transcript pp. 85-86.) *But no other bond was given.* (Transcript

p. 120.) *No bond was given by the applicant as Section 566 of the Code of Civil Procedure requires,* when a Receiver is appointed upon an ex parte application. Consequently the receivership was void and subject even to collateral attack. Of course, Col gave the bond that was sued upon—the Receiver's bond—but there was no other bond given; i. e., the *applicant* did not previously give any bond as the Code requires.

In the case of

Bibby v. Dieter, 15 Cal. App. 45,

the court held that where the applicant's bond was not given before the appointment of a Receiver upon an ex parte application, the court had no jurisdiction to appoint a Receiver, and the order was null and void. In that case the court said:

> "The order is void and could not be validated by any subsequent proceeding * * *. It is equally clear that jurisdiction of the court to appoint the receiver could be questioned in any action in which the appointment * * * is involved, for in such case the appointment is an absolute nullity."

In the case of

Ryan v. Murphy, 39 Cal. App. 640,

the court said that

> "this requirement of the Section is mandatory, and where it has not been complied with the appointment is void."

In

Davila v. Heath, 13 Cal. App. 370,

the court stated that

> "Non-compliance with the statute would render the appointment void."

As stated in

Van Alen v. Superior Court, 37 Cal. App. 696,

"the order was void."

Likewise it was so held by the Supreme Court in

Stoff v. Erken, 172 Cal. 481,

where upon the ex parte appointment of a Receiver, the only bond given was the one filed by the Receiver. But the court held that as the record did not show any applicant's bond, or any order of court requiring it,

> "We cannot consider this bond (the Receiver's Bond) at all."

Consequently the proceeding was void, as there was no initial bond required of the *applicant* or filed by it.

B. Col Was An Interested Party—A Stockholder; and Could Not Be Appointed Receiver Without the Written Consent of the Col Company.

Section 566 of the Code of Civil Procedure also provides that no party interested in an action can be appointed Receiver without the written consent of the parties. In this case Col was an interested party, i. e., a heavy stockholder (Transcript p. 114); and he was appointed upon the ex parte application of the plaintiff of the suit in Santa Clara County, and without the Col Company's consent. As soon as the corporation ascertained of his appointment it proceeded to secure the annulment of the order, and applied to the Supreme Court of the State for a writ of Prohibition. The case is reported as follows:

A. G. Col Co. v. Superior Court, 196 Cal. 604.
(Transcript p. 83.)

In that case the court held that as there was no

> "written consent of the parties, filed with the Clerk as provided by Section 566 of the Code of Civil Procedure; the appointment * * * of a party who was a stockholder in the plaintiff corporation, was without jurisdiction of the trial court."

For these reasons it was held that

> "the court was without jurisdiction to make the appointment * * *. It is the order of the court that the order of the trial court by which A. G. Col was appointed receiver on the ex parte application of the plaintiff * * * be * * * vacated and annulled." (Transcript p. 83.)

From this it follows that the bond was void, and cannot be enforced. This proposition is sustained by the authorities referred to in the next subdivision of our brief.

II.

AS THE SUPERIOR COURT ACTED IN EXCESS OF ITS JURISDICTION IN APPOINTING COL RECEIVER, THE ENTIRE PROCEEDING WAS VOID, AND NO SUIT CAN BE MAINTAINED UPON THE BOND. THIS IS SETTLED LAW IN CALIFORNIA. (Taylor v. Exnicious, 197 Cal. 443.)

The order appointing Col Receiver was an ex parte one. (Transcript pp. 6, 83, 46-7.) Section 566 C. C. P. provides that if a Receiver is appointed upon an ex parte application, the court "*before* making the order must require from the *applicant* an undertaking * * * to the effect that the applicant will pay * * * all damages." The same section also provides that no person "interested in an action" shall be appointed Receiver. Col was a stockholder of the corporation

at the time. (Transcript p. 114.) This latter fact was commented upon by the Supreme Court in its decision annulling the receivership. *A. G. Col Company v. Superior Court,* 196 Cal. 604, at pp. 617-8. And for that reason, as well as other reasons set forth in the opinion, the Supreme Court held that the Superior Court was "without jurisdiction to make the appointment," and "vacated and annulled" the order appointing Col Receiver. (Transcript p. 83.) Consequently we are confronted with this situation:

The Superior Court made a purported order appointing Col Receiver, and the order also directed him to give a bond upon qualifying. (Transcript p. 47.) Pursuant to this void order Col furnished the bond sued upon in this case. It was later held that the Superior Court had exceeded its jurisdiction, and the entire proceeding was annulled.

From this it follows that no action can be maintained upon the Receiver's bond, for it is well settled in California that no suit may be maintained upon a Receiver's bond when the court has exceeded its jurisdiction in making the appointment. If the court goes beyond its authority in appointing a Receiver, the entire proceeding is void, and a material consideration for the bond fails, and no action can be maintained upon the bond. The courts hold that a surety has the right to presume that he is acting pursuant to a valid order of the court, and *if the order is invalid no liability is assumed.*

This matter was thoroughly covered by the Supreme Court of California in the case of

Taylor v. Exnicious, 197 Cal. 443.

In that case the Superior Court appointed a Receiver for the Goewey Investment Company, a corporation, but as it exceeded its authority the order appointing the Receiver was annulled by the Supreme Court. Thereupon suit was brought upon the Receiver's bond. The court held that the action could not be maintained. The court said:

> "We take it, therefore, to be the well-settled law of this state that a surety upon a bond given pursuant to an order of court or pursuant to a statute becomes such in contemplation of a *valid order* or *valid statute,* and not otherwise. If the order appointing the receiver be void, a material consideration for the execution of the bond has failed, and the surety cannot be held upon it. The same rule holds in many other jurisdictions. (Citing cases.) The condition and obligation of the bond in the instant case is that '*whereas, an order* was made on the 26th day of June, 1919, by the Superior Court of the City and County of San Francisco, State of California, appointing the above named principal receiver in the above entitled cause, and requiring that a bond be given by said receiver in the sum above named * * *.' *The bond is squarely predicated upon and is given in compliance with an order which the court had no jurisdiction to make.*" (Italics ours.)

That is the same situation as in the case at bar. For in the bond in the case at bar it is recited that

> "whereas by an order of the Superior Court of the State of California in and for the County of Santa Clara, made on the 30th day of June, 1925, in an action therein pending * * * it was among other things ordered that the above bonded A. G. Col be appointed Receiver * * * and that he be vested with all rights * * * as such receiver upon the filing of a bond for the faithful per-

formance of his duties in the penal sum of $5000.00." (Transcript pp. 85-6.)

Consequently the situation in the case at bar is parallel to the *Taylor* case. The Superior Court appointed a Receiver, but exceeded its jurisdiction in doing so. The order appointing the Receiver was annulled by the Supreme Court, and consequently the entire proceeding was without vitality and the bond cannot be enforced.

In the *Taylor* case the authorities are collected, and the reasons for the conclusion are fully set forth.

The decision in the *Taylor* case conforms to the overwhelming weight of authority. To the same effect see:

Quiggle v. Trumbo, 56 Cal. 626.

In that case a Court Commissioner had appointed a Receiver in an action pending in the court. The Receiver purported to qualify as such, and the defendants executed a bond upon his behalf, and the Receiver then took possession of the property. It appeared, however, that the order appointing the Receiver was in excess of the authority of the Court Commissioner. Accordingly the court held that the order appointing the Receiver was void, that the bond was also void, and that no recovery could be had upon it.

The foregoing case has been frequently referred to in approval by the authorities.

In

Alderson on Receivers, p. 188,

it is cited in support of the author's statement that

when the order appointing the Receiver is void "the bond given by the Receiver so appointed is void."

In 34 *Cyc.* 505-6 the editors say:

> "Where the appointment of a receiver is absolutely void, a bond given by such receiver is also void."

A case which on principle is exactly parallel is

Conant v. Newton, 126 Mass. 105.

In that case a trustee had been appointed by the Probate Court and gave a bond pursuant to the order of the court. It developed later that the court had no power to appoint the trustee. It was held that the bond was void and could not be enforced either under statute or at common law. The court said that it was contemplated that "they intended to become liable as sureties to one who was under the jurisdiction of the Probate Court," and that he would conform to its rules and orders.

So in the case at bar the bond recites the appointment of the Receiver by the court, and was given only in the contemplation of such appointment.

The *Conant* case is referred to in

9 *Corpus Juris,* page 27,

where the editors make the following comment in note 82:

> "A bond given to a judge of probate by one acting as trustee under an illegal appointment is not good as a common law bond against the co-obligors, where it was signed by them under the belief that the trustee was subject to the jurisdiction of the probate court."

Then follows a quotation from the cited case which reads:

> "They (the sureties) intended to become liable as sureties for one who was under the jurisdiction of the Probate Court, and who in administering the estate must conform to the rules and practice of that court. To hold them bound as upon a voluntary contract to be responsible for a trustee not subject to the jurisdiction of the probate court, would be to change the character of their contract and to increase their liability."

The last sentence particularly applies to the case at bar for the surety only undertook to be responsible for a Receiver that was subject to the jurisdiction of the court.

This is apparent from the second paragraph of the bond, which recites the order of the Superior Court providing for a bond in the sum of $5000.00. (Transcript pp. 85-6.)

This shows that the bond was given in reliance upon a supposed valid order of the court appointing the Receiver.

In 9 *Corpus Juris,* pages 28-9 (Section 44) the editors make the following statement:

> "Bond Exacted Colore Officii. A bond exacted by a judge or other public official under the pretended authority of his office, and which he is not legally authorized to require, is void."

In note 99 to the above section the editors make the general statement supported by numerous authorities that

> "A bond exacted in a judicial proceeding by a court having no jurisdiction is void."

The case of

Coburn v. Townsend, 103 Cal. 233,

is squarely in point upon the principle involved in the case at bar. In that case condemnation proceedings had been instituted and pursuant to a section of the code, the plaintiff took immediate possession of the property upon giving an undertaking provided by Section 1254, C. C. P., as it then stood. But the section was invalid and the court had no power to order the bond to be given. Accordingly, it was held that no recovery could be made upon the bond against the sureties. The court said:

> "The bond was given in pursuance of an order of the court in the condemnation proceedings. * * *. The judgment must be affirmed. In the first place the provision of the code * * *, under which the orders for possession were made in the condemnation proceedings, was held to be and was unconstitutional *and the bonds or undertakings here sued on were void.*" (Italics ours.)

The cited case parallels the case at bar. In the case at bar the court had no authority to appoint a receiver or to require the bond. In the cited case, the court had no power to put the plaintiff into possession of the property sought to be condemned or to require a bond as a condition for such order. In both cases the proceedings were "*in invitum.*"

The same principle has been applied in disallowing recovery upon various bonds. In the case of

City and County of San Francisco v. Hartnett, 1 Cal. App. 652,

the amount of a bail bond was fixed by the Bond and Warrant Clerk and not by the court. As the Bond

and Warrant Clerk had no authority to fix the amount it was held that the bond itself was void and the surety could not be held upon it either as a statutory or as a common law bond.

In

People v. Cabannes, 20 Cal. 525,

a bond was required by a Justice of the Peace upon a criminal appeal. There was no authority for the requirement of this bond, and accordingly it was held that there could be no recovery upon it. The court said:

> "In taking the bond the Justice has exacted a security which the statute does not require; and such being the case we are of the opinion that no liability resulted from its execution."

So in the case at bar, as the Superior Court had no authority to appoint the Receiver or require any bond, "no liability resulted from its execution."

In the case of

County of Merced v. Shaffer, 40 Cal. App. 163,

the bond provided a greater penalty than was provided by the order of the court. It was held that the bond was void. The court said:

> "It is not disputed that the bond in a criminal proceeding is purely statutory and must conform to the statute and the order of the court. If it fails to do so it is not good, even as a common law obligation (citing cases)."

The language of the court applies to the bond of a Receiver for that also is "purely statutory."

It has been frequently pointed out that when the Superior Court has no jurisdiction to appoint a Re-

ceiver, whatever is done in that behalf, even by consent, is not only *irregular and erroneous, but absolutely void and of no effect.*

Elliott v. Superior Court, 168 Cal. 727.

It is subject to even collateral attack.

Bibby v. Dieter, 15 Cal. App. 45, at p. 48.

In

Mittnacht v. Kellerman, 12 N. E. 28 (N. Y.),

a bond was taken by a judge of a trial court, but as his statutory authority was lacking to make the order in connection with which the bond was given, it was declared that the bond itself was void.

Olds v. State, 6 Blackf. (Ind.) 91,

holds that sureties were not liable on a constable's bond where the appointment of the constable was made by a Justice of the Peace without any statutory authorization.

Commonwealth v. Jackson, 1 Leight (Va.) 485,

holds an official tax collector's bond was void when the collector was appointed by the Hustings Court without statutory authority.

Leona, etc. Co. v. Roberts, 62 Texas 615,

holds that a bond required by the Governor from irrigation companies without statutory authority was void.

Alexander v. Silvernageo, 27 Louisiana Ann. 557,

holds that a bond given by intervenors in a suit in order to release a crop sequestered by the plaintiff was invalid because the court had no authority under the law to release property in this manner.

Harris v. Simpson, 4 Littell (Ky.) 165,
holds that a recognizance of special bail taken by a sheriff outside of his county is extra-official and void.

Caffrey v. Dudgeon, 38 Ind. 512,
holds that a bond approved by a Justice of the Peace in a replevin suit is void where the value of the property exceeded the jurisdiction of the Justice. The case cites and follows *Benedict v. Bray,* 2 Cal. 251, and holds:

> "A bond exacted by an officer when he has no authority to require it is void."

Moore v. Allen, 26 Ky. 613,
holds void a bond exacted by the prison keeper without legal authority upon release of the prisoner.

Counts v. Harlan, 78 Alabama 551,
holds that a bond taken by an officer executing a void search warrant is void. The officer had no authority and was a mere trespasser.

Walker v. Fetzer, 34 S. W. 536 (Ark.),
holds void a bond required by a Justice of the Peace upon seizure of a mare, being unauthorized by statute.

McLendon v. Smith, 68 Georgia 36,
holds that when a person imprisoned under an attachment for debt gave a bond to the judge conditioned upon his submitting himself for imprisonment in case he was remanded to custody was void, as the judge did not have authority to require a bond of that character.

Byers v. State, 20 Ind. 47,
holds that a bond taken by an officer acting under

supposed statutory power is void unless the instrument was authorized by statute.

Florrance v. Goodin, 44 Ky. (5 B. Mon.) 111, holds that a replevin bond is void if the subject matter is not within court's jurisdiction.

In

Couchman v. Lisle, 33 Southwestern 940,

on an appeal from a probate judgment the appellants gave a *supersedeas* bond although no such bond was required by law. Upon affirmance of the judgment suit was brought on the bond for the amount of the judgment, which included expenses of a curator appointed after the appeal was taken and who was alleged to have taken possession of the estate by reason of the bond. Held that the appointment of the curator was without authority and the bond was unauthorized by law, and no recovery was allowed upon it.

Therefore it follows both on reason and authority, when a court appoints a Receiver or other officer of the court, but in so doing acts in excess of its jurisdiction, the entire proceeding is a void one. The order making the appointment is void; the order directing the bond is void; the order approving the bond is void; and the bond itself is void and is without consideration and cannot be enforced.

In the previously cited case of

Taylor v. Exnicious, 197 Cal. 443,

the matter was thoroughly gone into by the court, and the decision of the present Chief Justice of California was concurred in by all of the other Justices,

and we submit that it controls the situation in this case.

The foregoing cases that we have cited show that the statement in the *Taylor* case

> "that a surety upon a bond given pursuant to an order of the court * * * becomes such in contemplation of a valid order * * * and not otherwise. If the order appointing the receiver be void a material consideration for the execution of the bond has failed, and the surety cannot be held upon it."

is supported by the overwhelming weight of authority.

III.

THE INSTRUCTION OF THE COURT ALLOWING THE JURY TO CONSIDER "LOSS OF PROFITS, ATTORNEY FEES AND COSTS, LOSS OF CREDIT AND GOOD-WILL, AND ANY OTHER ITEMS OF LOSS PROVED TO HAVE BEEN SUFFERED BY THE PLAINTIFF BY REASON OF THE APPOINTMENT OF A RECEIVER," ALLOWED THE JURY TO GO INTO THE REALM OF SPECULATION, AND TO CONSIDER MATTERS NOT EMBRACED WITHIN THE PLEADINGS IN THIS CASE.

In this case plaintiff sought to recover for loss of profits, loss of credit and good-will, and for attorney fees and expenses incident to the litigation in procuring the annulment of the order appointing the receiver. (Transcript p. 9.) Consequently these were the only items that the jury were entitled to consider in determining the amount of the plaintiff's supposed loss. Upon the trial of the case the plaintiff introduced evidence showing the attorney fees and expenses incident to the proceeding in Prohibition to procure

the annulment of the order appointing the Receiver; they showed payment had been stopped on a number of checks when Col was appointed Receiver, and certain testimony was given indicating that certain firms would not deal with the plaintiff below after the receivership. On the other hand, testimony introduced on behalf of the defendant below was to the effect that the corporation had never made any profits, and that it was virtually insolvent at the time of the receivership (Transcript pp. 89-95); that payment was stopped upon the checks because there was not enough money in the bank to meet them, and criminal proceedings might have resulted had not the receiver taken that precaution. (Transcript pp. 68-75.) It was also brought out that when the proceedings in the Supreme Court were instituted Mr. Col was no longer acting as receiver, and there was no necessity to apply to the Supreme Court to oust him. The proceedings were really to oust his successor Mr. Napoli, and it was unnecessary to spend any money to oust Col.

The evidence on these issues was sharply conflicting, and numerically the witnesses preponderated in favor of the defendant below.

Upon oral argument plaintiff's attorney spoke not only of loss of credit and good-will, and expenses incident to the litigation and loss of supposed profits, but addressed the usual *ad hominem* argument to the jurors; what their feelings would be if they should return to their businesses at the conclusion of the trial and find that Receivers were in possession, etc. The jurors were in a frame of mind to seize upon any pre-

text to allow damages *outside of the issues.* We submit that it was prejudicial error to instruct the jury as follows:

> "5. In estimating the amount of damage you may take into consideration the loss of actual profits, the money actually paid out for attorney's fees and costs incident to procuring the discharge of A. G. Col as receiver, the loss of credit and goodwill of said business, *and any other items of loss proven to have been suffered by the plaintiff by reason of the appointment of A. G. Col as receiver."* (Transcript p. 132.)

The prejudice is apparent in this case, where the jury returned a verdict of $6300.00 (Transcript p. 36), although the bond was only for $5000.00.

The instruction covered "loss of actual profits," "money actually paid out for attorney's fees and costs," "loss of credit and good-will of said business." *Those were the only items embraced within the pleadings;* and when the court also instructed the jury that "in estimating the damage *you may take into consideration * * * any other items of loss proven to have been suffered by the plaintiff* by reason of the appointment of A. G. Col as receiver," it authorized the recovery of damages in addition to the items pleaded in the complaint and specifically mentioned in the instruction. When the court told the jurors that they could take into consideration *"any other items of loss proven,"* the jurors certainly must have supposed that they were at liberty to go beyond loss of profits, attorney's fees and costs, and loss of credit and good-will. It gave them freedom to go into the realm of speculation as to items of damage not embraced within the pleadings, nor within the issues the defendant was

called upon to meet. It is hard to conceive of a more prejudicial instruction on the question of damages. And the prejudice is reflected in the fact that the jury brought in a verdict of $6300.00 (Transcript p. 36), although the bond was only $5000.00.

As we have indicated, the evidence was very strong in favor of the defendant; that the corporation did not sustain loss of profits by reason of the receivership; defendant showed that the plaintiff below was a tottering institution which had lost its good-will; it introduced evidence that after the appointment of the Receiver things were stabilized and credit was then secured; and it may well be that the jurors believed there was no loss of profits or credit or good-will; and they were also justified in adopting the view that the attorney's fees claimed, $1200.00 (Transcript p. 84), were not expended to secure Col's removal at all, but rather that of his successor. Therefore it is not only possible, but extremely probable, that the jurors returned a verdict for damages based upon sentimental reasons, and justified by the instruction that they could "take into consideration *any other items of loss* proven to have been suffered by the plaintiff."

IV.

IN THIS CASE NO DEFAULT WAS ESTABLISHED IN THE SUPERIOR COURT AGAINST THE RECEIVER. IT IS WELL SETTLED THAT NO SUIT CAN BE MAINTAINED UPON THE BOND OF A RECEIVER, EXECUTOR, GUARDIAN, OR OTHER OFFICER APPOINTED BY THE COURT, UNTIL THAT OFFICER HAS BEEN CALLED TO ACCOUNT IN THE COURT WHERE THE ACTION OR PROCEEDING IS PENDING, AND A DEFAULT ESTABLISHED THERE.

It is well established that when a court appoints an officer, such as receiver, executor, or guardian, and directs him to give a bond, the sureties on the bond are not subject to suit until there has been an accounting in the court which appointed the officer, and a loss established by that court. This principle is of universal application. See

Cook v. Ceas, 143 Cal. 221, at 225,

where the court holds that it is

> "the settled rule in this state * * * that until the amount due * * * has been determined by the order of that court, and payment demanded, there is no default on the part of the trustee, and no cause of action against him or his sureties."

In that case the court was considering the case of a guardian's bond, but the principle is applicable to all similar appointees of the court. As stated in

Nickals v. Stanley, 146 Cal. 724, at 726,

> "It has been repeatedly held that an action cannot be maintained against the sureties of an executor, administrator or guardian for breach of a bond until the amount of the indebtedness has been determined by order of the probate court."

In the case of

Berthiaume v. Groom, 53 Cal. App. 286,

it is clear that the court shared the same view in an action against a Receiver and the sureties on his bond. The court said:

> "Final disposition of the funds of the receivership does not appear to have been made. * * * Until some such disposition of the receivership matter has been had, we are unable to comprehend by what right the plaintiff seeks to be subrogated to the entire fund, through the medium of an action against the receiver and his bondsmen."

In commenting upon this case the editors of *Cal. Juris.* say in

22 *Cal. Juris.* 485:

> "One may not maintain an action against a receiver and the sureties on his bond to recover moneys in his hands not paid into court as ordered where a final disposition of the funds of the receivership has not been made."

In

34 *Cyc.* 508

it is pointed out that before the sureties on a receiver's bond can be sued, there must be an accounting by the receiver and his default established and a decree establishing the Receiver's inability to pay. The law is there stated as follows:

> "Before any resort can be had to the sureties on a receiver's bond, all the remedies available against the receiver must be exhausted. Therefore, as a rule the liability of the sureties on a receiver's bond cannot be enforced until a default has been ascertained, on the final settlement of the receiver's accounts and there has been a decree establishing the receiver's inability to pay."

To the same effect see also *Tardy's Smith on Receivers,* second edition, pp. 2076-7. The author says:

> "It is a necessary precedent condition to the right to proceed against a receiver's surety * * * that there should be an accounting and an order made by the court directing the receiver to make the payment."

In

Alderson on Receivers, p. 193,

the author says:

> "A right of action on the bond does not and cannot accrue until there has been an accounting and order of court thereon; that is, until there has been a settlement."

In

High on Receivers, fourth edition, pp. 145-6,

it is said:

> "The receiver and his sureties cannot be sued upon the bond until the court has adjudicated the question and made some order touching the rights of the parties."

The plaintiff did not fulfill this condition precedent to his right of action. There was no accounting which showed any loss. Therefore plaintiff cannot maintain this action.

As a matter of fact Mr. Col did account to the Superior Court (Transcript pp. 102-106), and his accounts were found true and correct, and he was "formally discharged and his surety exonerated." (Transcript pp. 107-108.)

We offered to prove those facts but were not permitted to do so, which we likewise submit was prejudicial error.

But aside from our offer to prove these facts, plaintiff did not prove that any default had been established in the Superior Court, and that was a condition precedent to a suit upon the bond.

V.

OTHER INSTRUCTIONS ON THE QUESTION OF DAMAGES WERE ERRONEOUS.

A. Loss of Credit and Good-will Were Not Elements of Damage.

The court instructed the jury that they might take into account in estimating damages "the loss of credit and good-will." (Transcript p. 132.)

This is a nebulous item, and the allowance of such damages would lead the jury into the realm of speculation. In passing upon the question in a similar case—an attachment bond suit—

Elder v. Cutner, 97 Cal. 490, at 495,

the court said:

> "that evidence as to the effect of an attachment upon the credit and reputation of a merchant ought not to have been admitted, on the ground that damages resulting therefrom were too remote and contingent."

In this case the plaintiff's attorneys devoted a large portion of their time to testimony on the alleged loss of credit and reputation. (Transcript pp. 49-66.)

This should not have been admitted.

B. The Court Should Not Have Permitted the Jury to Take Into Consideration the Expenses Incident to Procuring the Annulment of the Order Appointing the Receiver.

In this case, over our objection, the plaintiff introduced evidence showing that it had expended $1200.00 to procure the annulment of the receivership; and the court instructed the jury (Transcript p. 132) that they could take into consideration the attorney's fees and expenses. This we submit was erroneous.

There is no statute authorizing this; in a case similar in principle it was held by this court that in the absence of statute attorney fees cannot be collected.

See

Java Cocoanut Oil Co. v. Fidelity and Deposit, 300 Fed. 302.

In that case this court affirmed the judgment of the District Court, which refused to allow attorney fees to be recovered upon an attachment bond which was conditioned "for the payment" of "all damages which it might sustain by reason of the attachment." The decision of course concerned only attachments, but it referred to the same principle on an injunction bond, and the reasoning applies likewise to a Receiver's bond. The court said:

> "The weight of authority would seem to sustain the ruling of the court below. But, aside from this, in the absence of some controlling decision from the highest court of the state, we must adopt a rule of our own in the light of the general law on the subject, and in so doing we would not feel justified in adopting a rule at entire variance with the decisions of the Supreme Court of the United States. In that court, at least, the rule is well settled. In Fidelity Co. v.

Bucki Co., supra, the court upheld a judgment for attorney's fees incurred in relation to an attachment, or in procuring its dissolution, solely because the decisions of the Supreme Court of Florida authorized the recovery. But in Tullock v. Mulvane, 184 U. S. 497, 22 Sup. Ct. 372, 46 L. Ed. 657, where the court was not controlled by the decisions of the state court it was held that attorney's fees were not recoverable in an action on an injunction bond, even though a different rule obtained in the courts of the state. The reason for the rule was thus stated in Oelrichs v. Spain, 15 Wall. 211, 231 (21 L. Ed. 43):

'In debt, covenant and assumpsit damages are recovered, but counsel fees are never included. So in equity cases, where there is no injunction bond, only the taxable costs are allowed to the complainants. The same rule is applied to the defendant, however unjust the litigation on the other side, and however large the expense litis to which he may have been subjected. The parties in this respect are upon a footing of equality. There is no fixed standard by which the honorarium can be measured. Some counsel demand much more than others. Some clients are willing to pay more than others. More counsel may be employed than are necessary. When both client and counsel know that the fees are to be paid by the other party there is danger of abuse. A reference to a master, or an issue to a jury, might be necessary to ascertain the proper amount, and this grafted litigation might possibly be more animated and protracted than that in the original cause. It would be an office of some delicacy on the part of the court to scale down the charges, as might sometimes be necessary. We think the principal of disallowance rests on a solid foundation, and that the opposite rule is forbidden by the analogies of the law and sound public policy.'

The rule there stated applies to action on attachment bonds as well as to actions on *injunc-*

tion bonds. Indeed, there would seem to be no difference between the two, for in either case the bond is conditioned for the payment of damages resulting from misuse or abuse of the process of the court."

This reasoning controls in the present case.

VI.

THE COURT REFUSED TO ALLOW THE DEFENDANT BELOW TO SHOW THAT COL HAD ACCOUNTED TO THE SUPERIOR COURT, AND THAT HIS ACCOUNT HAD BEEN APPROVED, AND THAT HE HAD BEEN DISCHARGED AND HIS SURETY EXONERATED FROM FURTHER LIABILITY.

Col was only a Receiver for a couple of days, and when he was superseded by the second Receiver (Napoli) Col filed his report and account (Transcript pp. 102-105), and his accounts were accepted and approved, and he was formally discharged and the surety on his bond was exonerated (Transcript pp. 107-108). We offered to show these facts, but were not permitted to do so, and we submit that this was error on the part of the trial court.

The court appointing Col Receiver was the court to pass upon his accounts, and either accept them, or establish the loss, if any. See subdivision IV of this brief. We offered to show that the court had ap- approved his account and discharged him and exonerated his surety. We should have been permitted to show these facts. The authorities cited in subdivision IV of this brief sustain our position.

VII.

IT WAS THE PLAINTIFF'S DUTY TO EXHAUST ITS REMEDIES AGAINST THE PRINCIPAL BEFORE PROCEEDING UPON THE BOND.

As we have previously indicated in subdivision IV of this brief, it was the duty of the plaintiff in this action to establish the Receiver's default before proceeding upon the bond.

But aside from that consideration the surety on Col's bond was not subject to liability unless and until the plaintiff had exhausted his remedies against Col. No showing has been made here of any effort to subject Col to any liability. No effort has been made to exhaust the remedies available against the Receiver. Therefore this action must fall. The law upon the subject is stated in 34 *Cyc.* 508 as follows:

> "Before any resort can be had to the surety on a receiver's bond, all the remedies available against the receiver must be exhausted."

Dated, San Francisco,
October 21, 1929.

Respectfully submitted,
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